SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 183

HAROLD WILLIAM KRONSBEIN,
Appellant,

vs.

THE TRUSTEES OF SCHOOLS OF TOWNSHIP THREE (3), RANGE NINE (9) WEST OF THE THIRD PRINCIPAL MERIDIAN, IN MADISON COUNTY, ILLINOIS, To-wit: JOHN HARBIG, JOHN KUNNEMANN and GEORGE HUGHES,
Appellees.

On Appeal from the Supreme Court of Illinois.

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM.

KENNETH F. KELLY,
1308a Niedringhaus Avenue,
Granite City, Illinois,

McGLYNN & McGLYNN,
(ROBERT E. McGLYNN),
120 North Main Street,
East St. Louis, Illinois,

Attorneys for Appellant, Harold William Kronsbein.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 1365.

HAROLD WILLIAM KRONSBEIN,
Appellant,

vs.

THE TRUSTEES OF SCHOOLS OF TOWNSHIP THREE (3), RANGE NINE (9) WEST OF THE THIRD PRINCIPAL MERIDIAN, IN MADISON COUNTY, ILLINOIS, To-wit: JOHN HARBIG, JOHN KUNNEMANN and GEORGE HUGHES,
Appellees.

On Appeal from the Supreme Court of Illinois.

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States.

STATEMENT.

Appellees' motion to dismiss or affirm can be summed up as follows:

I. The Supreme Court of Illinois was only required to pass on the question of service by publication and,

therefore, there was no Illinois Statute involved to present a federal question.

II. That the opinion of the Supreme Court of Illinois, as to Section 14 of the Eminent Domain Act of Illinois, was obiter dictum.

III. That the trial court never had determined the title or ownership of the property, and that appellant was not deprived of his interest when compensation was deposited with the county treasurer, pursuant to Section 14 of the said Eminent Domain Act, and the constitutional guaranty of just compensation was satisfied thereby.

All other points raised by appellees are waived in this court, because they were not presented to the Supreme Court of Illinois (Rule 39, Illinois Supreme Court, Chap. 110, Sec. 101.39, Ill. Rev. St. S-H).

Appellees now admit appellant, at all times relevant here, was the owner of the vested interest in the property, but all of the compensation was paid to the life tenant.

Appellees admit, and the record so shows, appellant never received any compensation for his interest in the property.

Appellees admit in their motion in this court that the payment of just compensation is a constitutional guaranty, but argue that the trial court never decided the title and, therefore, the payment of the compensation to the county treasurer, pursuant to Section 14 of the Eminent Domain Act of Illinois, fully protected the interest of appellant.

Appellees, therefore, admit that, if the trial court had decided the title and ownership, payment to the county treasurer could only be for the owners found, and the

Supreme Court's opinion to the contrary denied appellant his constitutional guaranty of just compensation.

The record shows that in the original condemnation proceeding the trial court in his preliminary order, and, in his order entering judgment for the compensation awarded by the jury, found and adjudicated the title and ownership of the property involved, to be in the trustees under the will of Henry Fehling, and in the last named order entered judgment in favor of said trustees, as owners, for the full amount of the compensation (Abs. of Rec. in Ill. Sup. Ct., Pgs. 26-27, Trans. of Rec. 3).

Later, on motion of the appellant, the same trial judge set aside the judgments in condemnation and held them void as to appellant, and held that appellant was the owner of the vested fee in said property, subject only to the life estate of said trustees (Opinion App. D, Juris Stat.).

Appellees took an appeal to the Appellate Court, which is a court of direct appeal since the adoption of the new Judicial Code in Illinois, with the Supreme Court, in the particular case, having a discretionary review (First National Bk. & Trust Co. v. Evanston, 30 Ill. 2d 479, 481). The notice of appeal to the Appellate Court was filed on January 14, 1964, fourteen days after said code went into effect (Abs. of Rec. in Ill. Su. Ct., Pg. 115, Trans. of Rec. Pg. 3).

The Appellate Court affirmed the trial court and also held that the compensation having been paid to a life tenant could not affect appellant's interest (App. C, Pg. A-22)..

Appellees filed a petition for leave to appeal, which became their brief in the Supreme Court, and the points they raised are set out in said petition at page 3 (Trans.

of Rec. 2), and these are the only points appellees can rely on in this court. Appellant filed an answer to the petition for leave to appeal, and set out his points to sustain the trial and Appellate Courts (Answer to petition for leave to appeal, Trans. of Rec., Pg. 9).

Appellant had the right to present any grounds to sustain the lower courts. (LaSalle National Bank v. Grayslake, 29 Ill. 2d 489, 492, 194 N. E. 2d 250; In re Estate of Leichtenberg, 7 Ill. 2d 545, 8, 9,—131 N. E. 2d 487.) But, appellees could not assign any error they had not raised in the appellate court. (Rule 39, Ill. Su. Ct., Mueller v. Elm Park Hotel Co., 391 Ill. 391, 398, 399, 63 N. E. 2d 365.)

The Supreme Court of Illinois pursuant to the issues before it made the following findings and holdings:

(1) On November 10, 1960, Harold William Kronsbein filed a motion to vacate the judgment on the ground that no jurisdiction over him was ever acquired in the eminent domain proceeding, and that the judgment entered in that proceeding was void as to him. (Pg. A-1, A-2.)

(2) That appellant here was the owner of a vested remainder interest in the property, subject to the life estate in the trustees under the will. (Pg. A-2.)

(3) That substituted service by summons did not give any jurisdiction over appellant. (Pg. A-2.)

(4) That the answer filed for appellant was unauthorized and gave no jurisdiction. (Pg. A-2.)

(5) That service by publication was proper (Pgs. A-2-3-4), and

(6) "The defendant also contends that the compensation awarded for the land was paid to the trustees for the life tenant, and that his interest was

> unaffected. In fact, however, the compensation awarded by the jury was deposited with the county treasurer pursuant to an order entered by the court. The disposition thereafter made of the money so deposited cannot affect the rights of the condemnor." (Pg. A-5);

and, after appellant's petition for rehearing, said court entered a modified opinion in which the court held:

> "The defendant also contends that the compensation awarded for the land was paid to the trustees for the life tenant, and that his interest was therefore unaffected. In fact, however, the compensation awarded by the jury was, in accordance with Section 14 of the Eminent Domain Act (Ill. Rev. Stat. 1953, Chapt. 47, para. 14), by order of the court deposited with the county treasurer for the benefit of the owners of, and parties interested in said tract of land. The disposition thereafter made by the money so deposited cannot affect the rights of the condemnor (Forest Preserve Dist. of Cook County v. Chicago Title and Trust Co., 351 Ill. 48, 55; County of Cook v. Vander Wolf, 394 Ill. 528.)" (Pgs. A-7-8) (Opinion Ill. Su. Ct. App. A & B. Juris. Stat.)

Appellees argue *obiter dictum* and that the record does not show a ruling by the trial court on title and ownership. For this reason, and for the convenience of the court, we will review the record, which record will conclusively show the trial court in the original proceedings found and adjudicated title in the trustees under the will of Henry Fehling, and that the Supreme Court's opinion as to section 14 of the eminent domain act was not *obiter dictum*, nor did the said court find defendant was in court by substituted service, but said court found that the service had was by publication and the trial court had jurisdiction in rem.

The Supreme Court of Illinois did not hold that there was substituted service on the Appellant, but in its opinion held there **was no substituted service of process on appellant,** nor was there any personal jurisdiction conferred over him by the void Answer filed for him. The opinion held service by publication was valid (Opinion A-2-Juris. Stat.). Service by publication did not give the trial court jurisdiction in personam, but only in rem for the purpose of enforcing rights in the property (Failing v. Failing, 4 Ill. 2d 11, 13, 122 N. E. 2d 167).

The Supreme Court of Illinois held that appellant was the owner of a vested remainder in the property, and the question before this court is, was appellant denied due process in violation of the Fourteenth Amendment to the federal constitution when no payment was made or secured to him of just compensation for his property.

The proceeding in eminent domain is a special statutory proceeding in which appellees were required to ascertain the true owner and the title at their peril, and appellant was required to do nothing. All of this is admitted by appellees by their failure to raise any error on the holdings of the appellate court, which holdings we have set out in our Jurisdictional Statement, Pgs. 13 and 14, and which appear in the Appellate Court Opinion, App. C-Pgs. A-9-22.

Appellant's Motion to Vacate appears in full in the record (Abs. of Rec. in Ill. Su. Ct., Pgs. 32, 33, Trans. of Rec. Pg. 3), as does the opinion of the trial judge, who was the same judge that entered the judgments in the original opinions (App. D-Juris. Stat., Pgs. A-23-38). The reading of the same will disclose that the Motion to Vacate covered the points that the trial court did not have personal jurisdiction of appellant, that the judgments were void by reason of being predicated on a void answer, that appellant was the owner of a vested interest, that he was

not paid compensation, the requirements in an Eminent Domain proceeding, and the raising of jurisdictional questions on the service of process by publication.

The trial court in his order vacating the judgment held:

> "The preliminary order of the court, dated November 2, 1953, and the judgment order, dated November 23, 1953, stated that the matter was heard on the petition and Answers of defendants, including Harold William Kronsbein. The undisputed evidence before the court shows that said defendant, Harold William Kronsbein, never employed anyone to represent him, nor gave any power of attorney to anyone to represent him or to employ counsel for him, and, that the purported Answer was not only without his authority, but without any knowledge on his part. **Where an attorney is without authority to represent a party, an entry of appearance by such attorney has no effect and a judgment entered thereon is void** (Gray v. National Bank of Chicago, 388 Ill. 124, 128)."

(Abs. of Rec. in Ill. Su. Ct. Pg. 57, Trans. of Rec. Pg. 3.) The trial court held the judgment void because no personal service, and, further, because based on an invalid Answer.

On appeal to the Appellate Court, the points appellees raised therein are set out in our Jurisdictional Statement, Pgs. 12-13.

The trial court in the original proceedings determined title and ownership of the property to be in the trustees under the will, and, entered judgment in favor of said trustees for the full amount of the compensation awarded by the jury. The Supreme Court in applying section 14 of the Eminent Domain Act to these admitted facts has denied appellant compensation for his property, and said opinion is admitted to be repugnant to the

fourteenth amendment to the Federal constitution. (Abs. of Rec. in Ill. Su. Ct. Para. 13, Pg. 23 and Pgs. 24 to 27, Trans. of Rec. Pg. 3.)

Appellees in their petition, in paragraph 8, alleged appellant's interest was a contingent remainder (Abs. of Rec. in Ill. Su. Ct., Pg. 7, Trans. of Rec. Pg. 3) and in paragraph 12 of said petition asked the court to pay compensation to said defendants or to such of them as have any interest in said property; (Abs. of Rec. in Ill. Su. Ct., Pg. 8, Trans. of Rec. Pg. 3.) the Answer filed for appellant denied the allegations of paragraph 7 of the petition wherein it was alleged:

> "That the said Harold William Kronsbein has a certain interest in said real estate under said will,"

and **admitted** the allegations of paragraph 8 of the petition, wherein it was stated appellant's interest was a contingent remainderman. (Abs. of Rec. in Ill. Su. Ct., Pg. 15, Trans. of Rec. Pg. 3.)

The trial court entered a preliminary order, before a jury was called, on November 2, 1953, in which he stated,

> "this cause coming on to be heard upon the petition . . . and the answers of defendants, W. J. Steele and Ivy Steele, Trustees, Frieda M. Kronsbein and **Harold William Kronsbein**, defendants."

In said order the court found appellant had an interest under the will in paragraph 9, and in paragraph 10, found the interest was a "contingent remainder"; and in paragraph 13 held:

> "That under the will of the late Henry Fehling the present trustees **who now hold title to said premises** are strictly forbidden to sell same and it is necessary that petitioners proceed to acquire in this proceeding **the title** to said described premises in accordance with the provisions of the statute."

and then entered a judgment for the condemnation of the property, and the matter of ascertaining the amount of just compensation be submitted to a jury. (Abs. of Rec. in Ill. Su. Ct. Pgs. 17-21, 22, 23 and 24, Trans. of Rec. 3.)

The next day after the entry of the preliminary order a verdict of the jury appears in the record. (Abs. of Rec. in Ill. Su. Ct., Pgs. 24, 25, Trans. of Rec. Pg. 3.)

On November 23, 1953, the trial judge entered his judgment on the verdict of the jury, and again found that he was hearing it on the answer of the appellant. In said order, under paragraph 3, the court stated:

> "3. That the court, by a previous order entered in this cause, **determined all of the preliminary questions, including title and ownership** of said tract of ground sought to be condemned and entered a judgment for condemnation, and called a jury to ascertain the just compensation to be paid to the owner or owners and persons interested in said tract of ground described in said petition and to make a report thereof to the court, except the interest of defendant William Rapp as the court had previously found that the said William Rapp was entitled to a judgment of $4000.00 for his interest in said tract by a valid agreement of the petitioners and the said William Rapp."

and his judgment was as follows:

> "It Is Therefore Ordered, Adjudged and Decreed by the court, that judgment be and the same are hereby entered in the court on the verdict of the jury and also on the stipulation heretofore entered into and approved and in favor of the defendants for just compensation, and all damages for the tract or parcel of land described in said petition as follows:

Wm. Rapp, Lessee, the sum of...$ 4,000.00
W. J. Steele and Ivy Steele, Trustees under the last will and testament of the late Henry Fehling, **owners**, the sum of.....$58,893.00."

(Abs. of Rec. in Ill. Su. Ct. Pge. 25, 26, 27. Trans. of Rec. Pg. 3).

It can be seen from the record, without contradiction, **that the trial court specifically found the trustees under the will had the title to said real estate prior to any hearing on compensation by a jury, and in his judgment order, entered a judgment for the trustees under the will, as owners, for the full amount of the compensation.**

Under said circumstances, and under the decisions of this court, and all of the Illinois decisions, full compensation was ordered paid to said trustees, and the deposit of said compensation with the county treasurer was merely to hold for the benefit of said trustees under the will. (See Point VI, Juris. Stat., Pgs. 28 to 31.) This is borne out by the court's order of distribution of said compensation to said trustees (Abs. of Rec. in Ill. Su. Ct. Pgs. 31 and 32, Trans. of Rec. Pg. 3). Said order was made and entered on **December 23, 1953**, pursuant to a petition filed December 21, 1953, wherein it was stated the court had ordered money paid to the county treasurer for the benefit of the owners, and they, as trustees, asked that it be distributed to them (Abs. of Rec. in Ill. Su. Ct. Pg. 30, Trans. of Rec. 3).

The trial court based its preliminary order of November 3, 1953, wherein he found and determined the title to be in the trustees, as owners, **solely on the pleadings**, as there is no record of any evidence of any proof of title anywhere in the record. The answer, now admitted to be void, could not confer on the court the right to bind appellant under such pleadings.

Appellees, by stating that Section 14 of the Eminent Domain Act only applied as "payment of compensation" under the constitutional guaranty of just compensation, where conflicting interests in the property had not been determined in the original proceedings, have admitted the opinion of the Supreme Court of Illinois, in applying the statute, under the circumstances in the case at bar, where the trial court had determined the title and ownership, was a denial of just compensation to appellant, and repugnant to, in violation of and void, under the due process clause of the Fourteenth Amendment to the Federal Constitution.

ARGUMENT.

I.

A.

Appellees' Points I (B) and (C), Under Their Points and Authorities in Their Motion, Have Been Waived by Their Failure to Present Said Points to the Supreme Court of Illinois.

Appellees in their Petition for Leave to Appeal in the Supreme Court of Illinois raised no such point (See Trans. of Rec., Page 2 and Page 3 of said Petition); nor did they even argue them in said court.

Points not raised were waived in the Supreme Court of Illinois. (Rule 39 of the Ill. Sup. Ct., Chapt. 110, Sec. 101.39, S. H. Ill. Rev. Stat., Vol. 2, 1965; Peo. ex rel. Carpentier v. Treloar, 13 Ill. 2d 596, 601, 150 N. E. 2d 624; Crane Construction Co. v. Symons Co., 25 Ill. 2d 521, 527, 185 N. E. 2d 139.)

Said Rule 39 was in effect at the time of the appeal in this case, and the pertinent part appears, as follows:

> "No alleged error or point not contained in the brief shall be raised afterwards, either by reply brief or in oral or printed argument or on petition for rehearing."

Appellees' Petition for Leave to Appeal in the Supreme Court of Illinois stood as their brief in said court.

This court has followed and recognized the practice of the Illinois Supreme Court.

In **Hulbert v. City of Chicago**, 202 U. S. 275, 50 L. Ed. 1026, the court on page 281 held:

> "According to the practice of the court, an error not assigned is not open to review. Berry v. Chicago,

192 Ill. 154, 155, 61 N. E. 498. Errors assigned, but not noticed or relied on in the brief or argument of counsel, will be regarded as waived or abandoned. Keyes v. Kimmel, 186 Ill. 109, 114, 57 N. E. 851. And such rule of practice will be recognized by this court. Erie R. Co. v. Purdy, 185 U. S. 148, 153, 46 L. Ed. 847, 850, 22 Sup. Ct. Rep. 605."

Appellees' motion to dismiss or to affirm is predicated on the proposition that the only thing presented to the Supreme Court of Illinois was the question of jurisdiction obtained by publication.

They have overlooked that, appellant filed an Answer to the Petition for Leave to Appeal, and that while appellees were confined to the points they raised, appellant could sustain the judgment of the trial and appellate court on any ground he wanted to present. (LaSalle Nat'l Bank v. Grayslake, 29 Ill. 2d 489, 492, 194 N. E. 2d 250.)

Appellees by their failure to contest in the Supreme Court certain findings of the Appellate Court are concluded thereby and cannot raise such questions in their motion.

The Supreme Court in its opinion recognized this when it held:

"The defendant [Appellant here] was her only child, and the appellate court held that he was the owner of a vested remainder interest in the property, subject to the life estate in the trustees for the benefit of his mother. This determination is not contested here."

and when it held:

"An answer was filed on behalf of the defendant by attorney, Joseph C. Steele, but at the hearing on the motion to vacate both Joseph C. Steele and the

defendant testified that Steele was not authorized to represent the defendant in the eminent domain proceeding. Whatever consequences may flow from the unauthorized answer, it did not give the court jurisdiction over the defendant." (App. A-2—opinion—Juris. Stat.)

The contentions now that the motion to vacate was too late, under I B, and the question of jurisdiction of the trial court, under I C, have been waived by the Appellees' failure to present it to the Illinois Supreme Court.

II.

The Supreme Court of Illinois Did Not Hold That Appellant Was in Court by Substituted Service, But Held That Service by Publication Was Acquired.

The Supreme Court of Illinois considered Section 14 of the Civil Practice Act of Illinois (Sec. 14, Chapt. 110, Ill. Rev. Stat., S. H. 1963), on Pages A-2 and A-3 of its opinion, and found service to be by publication (Opinion App. A-Juris. Stat., Pgs. A-2, A-3).

In **Failing v. Failing**, 4 Ill. 2d 11 (122 N. E. 2d 167), the court, on Page 13, held:

"It is fundamental too that no decree in personam may be taken against a defendant where service is by publication. Thus the orders appealed from here can be sustained only if the court had jurisdiction to enter an award in rem. Although a court has no power to enter a decree in personam based solely on constructive service of process against a nonresident defendant, it does have power to deal with his property within the court's territorial jurisdiction. Service by publication is usually sufficient where the object of the action is to reach and dispose of property, or of some interest in the property, within the court's jurisdiction."

The Supreme Court of Illinois held that appellant was not served by substituted service. On Page A-2 of the opinion, the court held:

> "In the eminent domain proceeding a summons directed to the defendant was left with his mother at her residence in an attempt to effect 'abode' service as authorized by Sec. 13 of the Civil Practice Act (Ill. Rev. Stat. 1953, Chap. 110, par. 137), but it is conceded that he did not at the time reside with his mother, and so jurisdiction was not secured by that method."

The court never acquired jurisdiction in personam over appellant; the only jurisdiction, as held by the Supreme Court of Illinois, was jurisdiction in "rem".

III.

Language of the Supreme Court is Not Obiter Dictum.

The Supreme Court of Illinois did not construe, but applied Section 14, of the Eminent Domain Act of Illinois, to the particular circumstances of the case at bar, as to appellant, and in so doing has prevented and denied payment of just compensation to said appellant; and by so doing has made said Statute in conflict with, repugnant to and void under the due process clause of the Fourteenth Amendment to the Federal Constitution. Such language is crucial to the question of payment of just compensation and was a legal principle deliberately passed upon in an attempt to show payment of compensation. The language is not obiter dictum.

Appellees have of necessity contended the language is obiter dictum because, with the language being necessary, their whole motion to dismiss or affirm falls. If, however, the language was not necessary, then they argue there is no statute of the State of Illinois involved that

is repugnant to the Federal Constitution, and so no federal question.

But, if the language is essential, then they admit the Supreme Court of Illinois is in error in applying the statute by ruling that the mere deposit of the compensation with the county treasurer absolves appellees from all responsibility as to payment, regardless of the determination of the trial court, or any court, as to title and ownership; and, by reason thereof, said Statute is repugnant to the Federal Constitution.

Appellees have not contested in this court the fact that the question involved was injected for the first time in the proceedings by the opinion of the Supreme Court of Illinois.

Appellees admit that under Section 14 of the Eminent Domain Act, the deposit of compensation is made for the benefit of the owners, but say in the proceeding at bar that the trial court did not determine and fix the interests of the defendants in the condemnation (Motion, Pg. 7), and the interests of the parties in the real estate taken in the condemnation had not been determined prior to the judgment of condemnation (Motion, Pgs. 9-10).

Appellees, by their motion, admit that, if the trial court had determined the title and ownership in the property in the original proceedings, any deposit thereafter of compensation to the county treasurer could only be for the benefit of the owners, as found by the trial court; and it would only be in cases where the court had not so determined title and ownership, and there were conflicting interests to be determined, that by the deposit of compensation with the county treasurer, the condemnors would not be concerned with the disposition thereof.

Appellees, in their motion under Point II of the Points and Authorities, state:

"Appellant was not deprived of his interest in the real estate by the payment of the value fixed therefor to the county treasurer **pursuant to Sec. 14, Chapter 47, Illinois Revised Statutes 1953** (Pg. 9)."

and under A of said Point say:

"Both the **constitutional** and **statutory** requirements of just compensation are satisfied when the amount ascertained as such is paid to the county treasurer for the benefit of the owners and parties interested in the premises. . . ." (Pgs. 9-10).

With this statement, Appellees resolve the question of obiter dictum. **Payment** of just compensation **to appellant** is the constitutional guarantee not to someone else as was done in this case. If the Supreme Court of Illinois had not decided the question of payment, as it did, then it could not have reversed the appellate or trial courts. Jurisdiction in rem alone was not enough. Appellees' determination of title and ownership was at their peril, under the circumstances in this case. Appellees were required to see to it that **payment** was made or secured for the appellant, in order to safeguard his constitutional guarantees. The Supreme Court of Illinois knew this and decided this as a legal principle, and it was not obiter dictum.

Obiter Dictum Defined.

In **Larson v. Johnson**, 1 Ill. App. 2d 36, 116 N. E. 2d 187, the court on pages 40 and 41 held:

"Defendants seek to distinguish these cases on the ground that all that was said with respect to this doctrine in the Illinois decisions cited was obiter dicta. Their argument is that in each case the court decided them adversely to the defendant and only then did it affirm the doctrine above enunciated. When a court has before it various grounds urged

for reversal and it decides that a certain number are valid, it does not follow that because the first ground would have been sufficient for reversal, the other grounds do not deserve equal recognition as the basis for the court's judgment. Whether a legal proposition stated in an opinion is obiter dictum is to be determined from a reading of the entire opinion. If the opinion expressed on a legal question is one casually reached by the court on an issue unrelated to the essence of the controversy or based on hypothetical facts, then it is obiter dictum. If, however, the question involved is one of a number of legal issues presented by the facts of that particular case, the court's decision on that question is not dictum even though it be the last ground of many decided by the court, all in support of its final conclusion. (Goodhart, 40 Y. L. J. 161, 180.) It is often stated that all except that which is necessary to the decision of a case is obiter dictum. This is misleading, for nothing but the bare findings of the court is absolutely necessary to its decision as between the parties. For the purpose of legal precedent, we must look to all the issues presented by the facts of the case and to the legal principles applied by the court in the final determination of those issues. Our Supreme Court has made a distinction between judicial dictum and obiter dictum, meaning that a legal principle deliberately passed upon by a court establishes a precedent. Scovill Mfg. Co. v. Cassidy, 275 Ill. 462, 470."

(Cited in Commonwealth Edison Co. v. Allis Chalmers, 211 Fed. S. 712, 722.)

The Supreme Court of Illinois in the language used, in applying Section 14 of the Eminent Domain Act of Illinois, was in answer to an admitted holding of the Appellate Court of Illinois, which is as follows:

"A payment to a life tenant in a condemnation proceeding is of no effect as to the remainderman (Bartlow v. C. B. & Q. R. R. Co., 243 Ill. 332, 336)" (App. C. Juris. Stat., Pg. A-22).

The Supreme Court of Illinois held:

"The defendant's interest in the property in question arose under the will of his grandfather, which devised the land in question to trustees to pay the income to the defendant's mother for life, and provided that upon her death the land should go to her issue. The defendant was her only child, and the appellate court held **that he was the owner of a vested remainder interest in the property, subject to the life estate in the trustees for the benefit of his mother. This determination is not contested in this court**" (App. A. Juris. Stat., Pg. A-2).

and in the modified opinion of the Supreme Court of Illinois, filed after appellant's petition for rehearing, the court held:

"The defendant also contends that the compensation awarded for the land was paid to the trustees for the life tenant, and that his interest was therefore unaffected. In fact, however, the compensation awarded by the jury was, in accordance with section 14 of the Eminent Domain Act (Ill. Rev. Stat. 1953, chap. 47, par. 14), by order of the court deposited with the county treasurer 'for the benefit of the owners of, and parties interested in said tract of land.' The disposition thereafter made of the money so deposited cannot affect the rights of the condemnors. (Forest Preserve Dist. of Cook County v. Chicago Title and Trust Co., 351 Ill. 48, 55; County of Cook v. Vander Wolf, 394 Ill. 521, 528)" (App. B., Pgs. A-7, A-8, Juris. Stat.).

The said court deliberately passed upon a legal principle, and stated that all appellees had to do was to pay

the compensation to the county treasurer, without given any consideration to the proceedings in the trial court, or to any requirement as to the ascertainment of title, as to which, under the eminent domain act, appellees were required to allege and prove at their peril. (See our Points II, III, Juris. Stat., Pgs. 21 to 27.) The trial court preliminary to the determination of compensation had, by a judgment order, determined the title and ownership of the property. The Supreme Court recognized that in order to comply with its own constitution which requires the payment of, or securing payment of just compensation to appellant, and the due process clause of the Federal Constitution which requires the same, that it would have to hold that payment of compensation was in some way made or secured to appellant. It thus, established a legal precedent and passed on the most crucial legal point in the case. Such holding, though erroneous as to the law, was not and could not be obiter dictum.

IV.

This Court Has Jurisdiction.

As to Point I of appellees' "Points and Authorities", we did not discuss the interpretation of section 14 of the Civil Practice Act of Illinois for the reason it had nothing to do with the issues presented.

The federal question arises out of the failure of appellant to receive any compensation for his property, and this involved, as we have previously stated, the application of section 14 of the Eminent Domain Act of Illinois by the Supreme Court of Illinois in its opinion.

Even if the trial court had jurisdiction in rem, the appellees by alleging and contending at all times, that appellant had no interest to require jurisdiction over him, that the trustees under the will were vested in fee, and had the trial court entering judgments on said allegations

and void answer of the appellant, said judgments in the original proceedings were void and not binding on appellant.

We have fully discussed this matter in our Jurisdictional Statement, and we find no reason from appellees' motion to digress therefrom and we adhere to it (Juris. Stat. Pgs. 2 to 4, 17 to 21). Appellees have cited three federal cases under said point.

In **Willoughby v. Chicago**, 235 U. S. 123, a question of a property assessment in Illinois was involved. The court on page 126 held:

> "If there was anything in this objection, it was obvious from the beginning; and as it was not taken at the trial, it was not open in the Supreme Court of that state and could not be considered here."

In **Congress of Ind. Organization v. McAdory**, 325 U. S. 476, was involved a declaratory judgment proceeding involving the Bradford Act. The record showed parties had agreed not to enforce the act until a companion case was settled.

The court held that the proceeding **was not adversary**, and, further, the assignment of error was not raised in the Supreme Court of Alabama.

In **Hulbert v. City of Chicago**, 202 U. S. 275, involved an assessment to defray the cost of paving a street in the City of Chicago. Plaintiff in error had filed objections to the assessment.

The court on page 280 held:

> "The mere claim in the objections to the confirming of the assessment, **never afterwards brought to the attention of the Supreme Court (Illinois) was not sufficient.** There is no evidence in the record to show

> that the decision of either of the courts was invoked by plaintiff in error upon a right claimed under the Constitution of the United States."

These cases all held no question was ever presented to the state courts to pass on. Such is not the situation in the case at bar.

We are not claiming the Supreme Court of Illinois construed a statute of Illinois. We have stated that said court for the first time in its opinion applied an otherwise valid statute to the case at bar, and in such application made it repugnant to, and in violation of the due process clause of the Fourteenth Amendment to the Federal Constitution. We raised the question and appellees admit it by not saying we did not (Juris. Stat. Pgs. 5 to 8; 17 to 21).

V.

Section 14 of the Eminent Domain Act Applies Only if Conflicting Claims Are Presented Before the Jury Trial. In Such an Event the Parties Should Be Required to Present Their Claims in the Hands of the County Treasurer.

Appellees contend under point II of their "Points and Authorities" that the payment to the county treasurer did not deprive appellant of his interest in the real estate.

On page 7 of their motion appellees, in speaking of the order of the trial court dated November 23, 1963, say:

> "The court did not in that order determine and fix the interests of the defendants in the condemnation suit.";

and thereafter appellees paid the amount fixed in the order to the county treasurer under section 14 of the Eminent Domain Act.

Under appellees' Suggestions, on page 11, and under point II, appellees say:

> "The interests of the parties in the real estate taken in the condemnation proceedings had not been determined prior to the judgment of condemnation. The judgment ordering payment to the county treasurer protected the rights of all interested payments."

Under point II, appellees are saying just about what the Supreme Court of Illinois said; then on page 7, they say the trial court in his order of November 23, 1953, did not determine and fix the interests, and on page 11, said the interests had not been determined prior to the judgment of condemnation.

Appellees cite:

Public Service Co. v. Rietveld, 320 Ill. 56, 150 N. E. 403, in which case the rights of the parties had not been determined prior to the calling of the jury.

The court on page 60 held:

> "The rights of the appellants among themselves were not determined prior to the calling of the jury." . . . "where such interests are not established the jury has but one question, namely, the amount of compensation to be paid to the county treasurer for the benefit of the owners and parties interested in the property."

Forest Preserve Dist. v. Title & Trust Co., 351 Ill. 48, 183 N. E. 819.

In this case appellants complained certain "unknown owners" were involved, and that the court erred in not having the interests fixed before proceeding with the jury.

The court on page 55 held: Appellants could not complain that other defendants were not parties; and on page

55 held: That it is not necessary to determine interests before a jury trial, and this could be later determined.

In **City of Chicago v. McDonough,** 351 Ill. 200, 184 N. E. 322.

City of Chicago condemned a piece of ground that belonged to the Chicago Title & Trust Co. Verdict was returned by a jury and paid to the County Treasurer. McDonough, the county treasurer, by agreement with the owner paid sums to certain tax title holders and to appellant, and retained certain portion for current taxes that were due at the time of the condemnation and certain expenses.

Owner sued to recover the retained money.

The court on page 204 held this involved conflicting claims, and lienholder did not have to litigate his claim in the condemnation suit, but could do it in a separate proceeding against the award in the hands of the county treasurer.

There was no claim by the owner of the paying the award to the county treasurer. The Supreme Court declined jurisdiction and transferred the case to the Appellate Court.

In **C. & N. W. Ry. Co. v. Mechanics' Inst.,** 239 Ill. 197, 87 N. E. 933, the petition stated that the Chicago Mechanics' Institute were the owner of the record title in the property in question and that certain named persons were interested in said property, and also there were other persons who were unknown to petitioner, who were interested. Error was claimed because the court refused to instruct the jury to return a verdict as to appellants' interest. Court on pages 216 and 217 held:

> "In condemnation cases the jury are empaneled merely to ascertain and report the just compensation to the owner of the property sought to be taken

or damaged. No issue as to the ownership can be presented to the jury. The question of title, if any, is preliminary to the submission of the question of damages to the jury. The proper practice is to require all persons claiming an interest to litigate and settle their interests in the property prior to empaneling the jury. (Metropolitan Elevated Railway Co. v. Eschner, 232 Ill. 210; Chicago and Northwestern Railway Co. v. Miller, 233 id. 508.)"

"**While this question of title should have been settled first, no such question was raised before the jury was empaneled,** and it is very plain from this record that the failure to so settle the titles did not affect the amount of the verdict. The trial court can, on motion, at any time in the future, settle to whom this money is to be paid. On the facts in this record there may still be a dispute concerning each of these properties as to the ownership of the interests involved. The case of Convers v. Atchison, Topeka and Santa Fe Railroad Co., 142 U. S. 671, we do not consider in point. In that case there was no dispute as to the ownership, and the court held that the trial court should have entered judgment in favor of the property owner without requiring him to make a motion at a later hearing, but held also that the mistake in entering the judgment did not require a new trial, and remanded the cause with specific directions to enter judgment in favor of the property owners for the amount of damages found by the jury. **Taking this decision in its most favorable light for appellants, the only thing that would be required by this court (if there were no question unsettled as to the ownership of these two interests) would be to remand the cause, with directions to the trial court to enter judgment in favor of the respective appellants for the amounts found by the verdict of the jury.** This, as we have seen, cannot be done in this

case, because it is not entirely clear from the record that other parties are not interested."

This latter case supports our position that the trial court had determined the title prior to empaneling the jury, and entered judgment accordingly. There was nothing left to be done, but to pay the money to the trustees under the will.

None of the first three cases are in point as to the facts in the case at bar. Our position has been that where there are conflicting claims, and they are not resolved by the trial court in the condemnation proceeding, then a separate judicial proceeding can be taken to determine said interests, and the court can direct the county treasurer to pay the money to the parties determined entitled to it and on such payment the condemnor can take possession.

However, in the case at bar, the trial court had determined the interests and the payment to the county treasurer could only be for the benefit of said persons. (Convers v. Atchison, Topeka & Santa Fe Ry. Co., 142 U. S. 671; County of Cook v. Vander Wolf, 394 Ill. 521, 527, 528-9, 69 N. E. 2d 256.) We have shown the law in Illinois as to section 14 of the Eminent Domain Act, under our points III and IV, V and VI, Jurisdictional Statement, Pgs. 22 to 31, is as stated in our point V herein.

The trial court in finding ownership in the trustees under the will, and entering judgment for them, the payment of the money to the county treasurer, was for their benefit only. Said trustees having a life estate, this is all appellees obtained in their condemnation, and all of the proceedings as to appellant were void, and his interest was never acquired.

CONCLUSION.

It is respectfully submitted that this court will not undertake to review what was not before the Supreme Court of Illinois.

Appellees' motion under I B, Pg. 8, and I C, Pg. 9, was not the subject of, nor involved in, the opinion of the Illinois Supreme Court, nor were any such points assigned as error in said court. These points, as stated, were waived.

The Supreme Court of Illinois did apply Section 14 of the Eminent Domain Act, and the language of the opinion established a legal precedent and pertained to the crucial point in the case, that being the denial of payment of compensation to appellant, the owner of the vested interest in the property.

The record in the trial court shows conclusively that said court determined the title and ownership of said property to be in the trustees under the will, a life tenant, and entered judgment for said life tenant for the full amount of the compensation, prior to any deposit of compensation with the county treasurer, and said deposit could only have been for the benefit of the said life tenant.

That appellant was never paid any just compensation, that his interest was never acquired, and he has been denied due process by the application of Section 14 of the Eminent Domain Act of Illinois and repugnant to and in violation of the Fourteenth Amendment to the Constitution of the United States.

That appellees admit that by a determination of ownership, by the trial court in the original proceedings, compensation would have to be paid to the owners so determined.

A most substantial federal question is involved: the guarantee to every individual to be secure in his property and that the same cannot be taken from him unless he receives just compensation.

Wherefore, appellant in this court respectfully prays that appellees' motion to dismiss or affirm be denied, and that this court take jurisdiction requiring plenary consideration be given by this court, with briefs on the merits and oral argument, for its resolution.

Respectfully submitted,

KENNETH F. KELLY,
1308a Niedringhaus Avenue,
Granite City, Illinois,
McGLYNN & McGLYNN,

(ROBERT E. McGLYNN),
120 North Main Street,
East St. Louis, Illinois,
Attorneys for Appellant,
Harold William Kronsbein.

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